

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

CUSTOMS AND TAX ADMINISTRATION OF
THE KINGDOM OF DENMARK
(SKATTEFORVALTNINGEN) TAX REFUND
SCHEME LITIGATION

MASTER DOCKET

18-md-02865-LAK

This document relates to: The cases identified in
Appendix A

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR
ISSUANCE OF A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE
TO OBTAIN EVIDENCE IN THE UK**

Plaintiff Skatteforvaltningen (“SKAT”) has moved the Court for the issuance of letters rogatory seeking to depose a non-party and to obtain documents through foreign discovery. Scrambling to patch a record devoid of the proof needed to sustain its claims of fraud, SKAT relies on pure speculation to claim a link between the discovery sought – records and testimony from J.P. Morgan London or J.P. Morgan Securities plc -- and the parties and issues in this action. In doing so, SKAT confuses the relationships between parties to this litigation and various other participants in the relevant transactional universe to manufacture an argument for relevance. This confusion, combined with SKAT’s reliance on speculation, leaves the Court with no basis to assess the probative value of the records SKAT seeks in what is a classic fishing expedition.¹ Because SKAT completely fails to carry its burden in demonstrating the relevance of the discovery sought, its request should be denied.

SKAT claims it needs the discovery because it bears on whether the defendants owned the Danish securities related to the dividend reclaim applications at issue in this litigation. But ownership can already be established with exclusive reference to the voluminous documents defendants have produced. (E.g., Exs. A – D to ECF No. 564, which include trade confirmations, account statements reflecting the purchase and sale of Danish securities, custodial records demonstrating the receipt of dividends, and filings with U.S. authorities reporting ownership of the Danish securities.) Within these records, there is nothing suggesting defendants maintained a relationship with either J.P. Morgan London or J.P. Morgan Securities plc (collectively, “J.P. Morgan London”) related to their ownership of Danish securities. Nor has

¹ By SKAT’s own logic, the motion also should be rejected as untimely. Over a month ago, SKAT objected to defendants’ motion seeking discovery through the Hague Convention on the ground that “Defendants could have made their motion months, if not years, ago,” and urged this Court to prohibit defendants from making use of any discovery that defendants obtained after June 30, 2021 as a result of their motion. ECF No. 553 at 1-2 (filed Mar. 15, 2021). If it was too late for defendants a month ago, it is certainly too late for SKAT now. That is reason enough to deny this particular request. *See, e.g., Skyline Steel, L.L.C. v. Pilepro, L.L.C.*, 2015 WL 13832108, at *1 (S.D.N.Y. Jan. 28, 2015) (denying motion seeking discovery through Hague Convention as untimely).

any defendant in this litigation claimed that they held accounts with that institution or that their ownership of the Danish shares depended upon such a relationship.

Instead, SKAT impermissibly attempts to shoehorn into *this* litigation an assertion by Sanjay Shah (not a party in the U.S.) related to Solo Capital LLC (“Solo”) (also not a party in the U.S.) and Solo’s own relationships with non-parties to *either* this litigation or the U.K. litigation. Worse, SKAT mischaracterizes the assertion to give the false impression of a link between the parties in this litigation to J.P. Morgan London. The precise language from the U.K. litigation relied upon by SKAT is as follows:

REQUEST:

5. Please identify the clients of the Credit Institutions with whom SCP held custody accounts and the periods for which such custody accounts were utilised by SCP in respect of dividend arbitrage trades the subject of these proceedings.

RESPONSE:

5. To the best of the Sanjay Shah Defendants’ knowledge and belief (pending disclosure):
 - 5.1. JP Morgan (in the period between approximately August 2012 to September/October 2013). And
 - 5.2. SEB (in the period between approximately July 2013 to April 2014).

ECF No. 569-5 at 4. SKAT incorrectly reads the foregoing to establish that J.P. Morgan London “allegedly held Danish Securities on Solo Capital’s behalf for the benefit of the Plan Defendants in this MDL.” ECF No. 568 at 2. Of course, the language does not go nearly so far, nor does it mention any of the Plan Defendants. Furthermore, SKAT’s U.K. lawyers expressly acknowledge on the following page of the same filing that Solo’s relationship with J.P. Morgan London did not involve holding securities at all, but was instead limited to *clearing futures*:

Under paragraph 56.4 of the Shah Defendants' Defence:

Of: "From approximately June 2012 onwards, SCP, the Sanjay Shah Defendants and/or their directors, in reliance on the matters aforesaid, became a client of JP Morgan through which it cleared futures."

ECF No. 569-5 at 5. Clearing futures and holding securities are entirely separate and divisible parts of a broader dividend arbitrage transaction.

In reality, SKAT has given the Court no basis on which it can conclude that the requested discovery is relevant to the parties and claims in *this* proceeding. SKAT points to nothing that connects the defendants' ownership of Danish Shares to any sub-custodial relationship between Solo and J.P. Morgan London.² The referenced U.K. filing does not mention a single Plan Defendant, let alone suggest J.P. Morgan London held Danish securities for any Plan Defendant's benefit.

Unable to show any connection between the defendants and J.P. Morgan London, SKAT boldly goes a step further and speculates that "other Custodians may similarly claim that J.P. Morgan served as a Sub-Custodian for them." ECF No. 568 at 2. This hypothesis—which, again, does not even suggest any connection between J.P. Morgan London and the actual defendants in this case—falls far short of the showing required to warrant the intensive discovery SKAT seeks. *See, e.g., In re Welspun Litig.*, 2018 WL 4693586, at *3 (S.D.N.Y. Mar. 4, 2018) (denying motion to compel where "Plaintiffs have provided no basis for this hypothesis [that the requested information was relevant] other than pure speculation, and it is settled law that parties

² Besides inaccurately characterizing the U.K. filing, SKAT continues to misconstrue the nature of custodial relationships. A sub-custodian of a custodian does not hold assets "for the benefit" of the custodian's clients, but for the benefit of the custodian. Thus, even if one indulges SKAT's speculation, whether the pension plan defendants' custodian transferred its assets to a sub-custodian does not matter, as the defendants' accounts would continue to accurately reflect defendants' assets in any case.

may not roam in shadow zones of relevancy to explore matter which does not presently appear germane on the theory that it might conceivably become so”) (cleaned up).

Even though SKAT has failed to articulate any connection between the discovery sought from J.P. Morgan London and the defendants in this case, it nevertheless requests seven hours of deposition testimony. Not one of the six topics for that testimony references the defendant Pension Plans. ECF No. 569-1 at 7, ECF No. 569-2 at 7. Likewise, SKAT seeks an array of documents across various categories that fail to mention the defendant Pension Plans. ECF No. 569-1 at 9, 569-2 at 9. Again, the defendants have already produced their own relevant account statements. Those statements reflect the Danish shares and show that the defendants did receive the dividends. There is no need to look to an account of a sub-custodian to figure out “whether the assertions of the Plans that they actually owned the Danish Securities, and received the dividends, are true or false”—the Plans’ own documents establish that they did own the shares and they did receive the dividends. Whether a custodian acting on behalf of the defendants actually went into the market and consummated the transactions that are reflected on the defendants’ statements (with or without the assistance of a sub-custodian) is a completely distinct issue. Whatever the answer to that question, it does not change the fact that the defendants in this litigation owned the shares.³ And the discovery SKAT seeks cannot answer even that irrelevant question, as J.P. Morgan London was not Solo’s only sub-custodian.

The defendants’ account statements alone will be relevant to SKAT’s claims in this case; statements of a Solo sub-custodian—whatever they may show—will not be probative of any

³ The analogy offered in response to SKAT’s prior motion remains equally apt here: if I have a bank statement that shows \$100 in a savings account, I am entitled to rely upon that statement and make the representation that I have \$100. One would never test that hypothesis by inspecting the records of the bank to ensure that it held at least \$100 in cash. But even if the bank turned out to have no cash at all, that would not change my entitlement to the \$100 reflected on my statement.

claim against the US defendants. At most, they may bear on the liability of Solo Capital and/or Sanjay Shah, which SKAT has sued in other jurisdictions. But Solo Capital is not a defendant in the US litigation. The defendants in the US never would have seen the records of Solo Capital's sub-custodians. Whatever those records reflect will have no bearing on SKAT's claim that the defendants in the United States defrauded SKAT.

SKAT's motion should be denied.

Dated: New York, New York

April 16, 2021

Respectfully submitted,

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Battu Holdings LLC Roth 401(K) Plan, Cantata
Industries LLC Roth 401(K) Plan, Crucible
Ventures LLC Roth 401(K) Plan, Monomer
Industries LLC Roth 401(K) Plan, Limelight Global
Productions LLC Roth 401(K) Plan, Loggerhead
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Benefit Plan, Moira Associates LLC 401K Plan,
Newsong Fellowship Church 401K Plan, Riverside
Associates Defined Benefit Plan, Robert Crema,
Stacey Kaminer, Alexander Jamie Mitchell III,
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APPENDIX A

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Elizabeth van Merkensteijn		19-cv-01893
Azalea Pension Plan		19-cv-01893
Basalt Ventures LLC Roth 401(K) Plan		19-cv-01866
Bernina Pension Plan		19-cv-01865
Bernina Pension Plan Trust		19-cv-10713
Michelle Investments Pension Plan		19-cv-01906
Omineca Pension Plan		19-cv-01894
Omineca Trust		19-cv-01794 19-cv-01798 19-cv-01788 19-cv-01918 19-cv-01928

Defendants	Counsel	Associated Case(s)
		19-cv-01931 19-cv-01800 19-cv-01803 19-cv-01809 19-cv-01818 19-cv-01801 19-cv-01810 19-cv-01813
Remece Investments LLC Pension Plan		19-cv-01911
Starfish Capital Management LLC Roth 401(K) Plan		19-cv-01871
Tarvos Pension Plan		19-cv-01930
Voojo Productions LLC Roth 401(K) Plan		19-cv-01873
Xiphias LLC Pension Plan		19-cv-01924
Rob Klugman	Mark D. Allison Caplin & Drysdale, Chartered 600 Lexington Avenue 21 st Floor New York, NY 10022 Tel: (212) 379-6000 mallison@capdale.com zziering@capdale.com	18-cv-07828 18-cv-07827 18-cv-07824 18-cv-07829 18-cv-04434
RAK Investment Trust		
Aerovane Logistics LLC Roth 401(K) Plan		18-cv-07828
Edgepoint Capital LLC Roth 401(K) Plan		18-cv-07827
Headsail Manufacturing LLC Roth 401(K) Plan		18-cv-07824
The Random Holdings 401(K) Plan		18-cv-07829
The Stor Capital Consulting LLC 401(K) Plan		18-cv-04434

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		1:19-cv-01781
		1:19-cv-01791
		1:19-cv-01794
David Zelman		1:19-cv-01918
		1:19-cv-01783
		1:19-cv-01798
		1:19-cv-01788
Edwin Miller		1:19-cv-01926
		1:19-cv-01922
		1:19-cv-01928
		1:19-cv-01929
		1:19-cv-01931
Ronald Altbach		1:19-cv-01809
		1:19-cv-01800
		1:19-cv-01803
		1:19-cv-01812
		1:19-cv-01818
Perry Lerner		1:19-cv-01806
		1:19-cv-01870
		1:19-cv-01792
		1:19-cv-01808
		1:19-cv-01815
Robin Jones		1:19-cv-01801
		1:19-cv-01810
		1:19-cv-01813
Ballast Ventures LLC Roth 401(K) Plan		1:19-cv-01781
Bareroot Capital Investments LLC Roth 401(K) Plan		1:19-cv-01783
Albedo Management LLC Roth 401(K) Plan		1:19-cv-01785
Dicot Technologies LLC Roth 401(K) Plan		1:19-cv-01788

Defendants	Counsel	Associated Case(s)
Fairlie Investments LLC Roth 401(K) Plan		1:19-cv-01791
First Ascent Worldwide LLC Roth 401(K) Plan		1:19-cv-01792
Battu Holdings LLC Roth 401(K) Plan		1:19-cv-01794
Cantata Industries LLC Roth 401(K) Plan		1:19-cv-01798
Crucible Ventures LLC Roth 401(K) Plan		1:19-cv-01800
Monomer Industries LLC Roth 401(K) Plan		1:19-cv-01801
Limelight Global Productions LLC Roth 401(K) Plan		1:19-cv-01803
Loggerhead Services LLC Roth 401(K) Plan		1:19-cv-01806
PAB Facilities Global LLC Roth 401(K) Plan		1:19-cv-01808
Plumrose Industries LLC Roth 401(K) Plan		1:19-cv-01809
Pinax Holdings LLC Roth 401(K) Plan		1:19-cv-01810
Roadcraft Technologies LLC Roth 401(K) Plan		1:19-cv-01812
Sternway Logistics LLC Roth 401(K) Plan		1:19-cv-01813
Trailing Edge Productions LLC Roth 401(K) Plan		1:19-cv-01815
True Wind Investments LLC Roth 401(K) Plan		1:19-cv-01818

Defendants	Counsel	Associated Case(s)
Eclouge Industry LLC Roth 401(K) Plan		1:19-cv-01870
Vanderlee Technologies Pension Plan		1:19-cv-01918
Vanderlee Technologies Pension Plan Trust		1:19-cv-01918
Cedar Hill Capital Investments LLC Roth 401(K) Plan		1:19-cv-01922
Green Scale Management LLC Roth 401(K) Plan		1:19-cv-01926
Fulcrum Productions LLC Roth 401(K) Plan		1:19-cv-01928
Keystone Technologies LLC Roth 401(K) Plan		1:19-cv-01929
Tumba Systems LLC Roth 401(K) Plan		1:19-cv-01931
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Defendants	Counsel	Associated Case(s)
		1:19-cv-01800 1:19-cv-01801 1:19-cv-01803 1:19-cv-01806 1:19-cv-01808 1:19-cv-01809 1:19-cv-01810 1:19-cv-01812 1:19-cv-01813 1:19-cv-01815 1:19-cv-01818 1:19-cv-01866 1:19-cv-01867 1:19-cv-01868 1:19-cv-01869 1:19-cv-01870 1:19-cv-01871 1:19-cv-01873 1:19-cv-01894 1:19-cv-01896 1:19-cv-01918 1:19-cv-01922 1:19-cv-01926 1:19-cv-01928 1:19-cv-01929 1:19-cv-01931
Acer Investment Group LLC	John C. Blessington K&L GATES LLP State Street Financial Center One Lincoln Street Boston, MA 02111 T: 617.261.3100 F: 617.261.3175 E: john.blessington@klgates.com	18-cv-09841 18-cv-09797 18-cv-09836 18-cv-09837 18-cv-09838 18-cv-09839 18-cv-09840 18-cv-10100 18-cv-05053
American Investment Group of New York, L.P. Pension Plan		18-cv-09841
DW Construction, Inc. Retirement Plan		18-cv-09797

Defendants	Counsel	Associated Case(s)
Kamco Investments Inc. Pension Plan		18-cv-09836
Kamco LP Profit Sharing Pension Plan		18-cv-09837
Linden Associates Defined Benefit Plan		18-cv-09838
Moirra Associates LLC 401K Plan		18-cv-09839
Newsong Fellowship Church 401K Plan		18-cv-10100
Riverside Associates Defined Benefit Plan		18-cv-09840
Robert Crema		18-cv-09841
Stacey Kaminer		18-cv-09841 18-cv-09797 18-cv-09836 18-cv-09837 18-cv-09839
Alexander Jamie Mitchell III		18-cv-10100
David Schulman		18-cv-09840
Joan Schulman		18-cv-09838
Darren Wittwer		18-cv-09797
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